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COMPULSORY ACQUISITION OF LAND: THE NEED FOR ROBUST GOVERNANCE TO DELIVER PUBLIC INTEREST PROJECTS THROUGH LAND ASSEMBLY

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Abstract

There are two separate dimensions of fairness to consider whenever land is compulsorily acquired. These are: the basis for which the land is acquired, and the means by which those affected are compensated. This paper considers these two matters in the Ugandan context, and in particular, with reference to the customary tenure system, as the dominant system (by land mass) in Uganda. The paper reviews whether the legislative and governance framework for compulsory acquisition in its current form can guarantee the fair acquisition of land for realizing infrastructure and public goods in Uganda. This is of particular relevance as the Ugandan parliament considers potential amendments to the constitutional principles of land acquisition.

Key Words: Acquisition, Compensation, Fairness, Governance, Infrastructure

1. Introduction

Secure land rights exist when rights holders are able to continue to exercise their rights to land without the fear of being arbitrarily dispossessed. There are nonetheless circumstances in which the state may need to acquire strategic land sites in the public interest. This is not incompatible with the notion of secure land rights provided the acquisition is not arbitrary, and provided appropriate compensation is paid. After all, there is no such thing to an absolute, indefeasible right to land, but perceptions of insecure tenure will be created unless citizens are secure in the knowledge that they will only be dispossessed in certain, well-defined and rare circumstances. Such circumstances should include justification which shows that the disbenefits of an individual being dispossessed are outweighed by a greater good, *and* where the loss will be rectified through the payment of compensation so that dispossessed rights holders are not left financially worse-off.

This reveals two separate dimensions to consider when reviewing the fairness of the legal framework for compulsory land acquisition in a given state:

a) what prevents the acquisition from being arbitrary?

b) how are rights holders compensated for the loss of rights?

It is only through the satisfying fairness on both dimensions that property rights can be forcibly removed and still lead to a just outcome. This paper considers these two matters in turn. It will also consider a further related matter: what happens to the land following the acquisition. To consider these three matters in practice rather than in the abstract, the paper will focus on Uganda's legal framework for compulsory acquisition legal procedures, including proposed changes to that framework, and the anticipated impact of that framework on customary rights holders. This is of particular importance in Uganda given the prevalence of customary tenure (approximately 80% by land area). It will also draw upon international comparisons to aid discussion of alternative approaches, and to consider how best to balance development ambitions with the protection of individual and community rights.

Although detailed matters of land governance are a matter for national governments, there are a number of international standards in respect of land acquisition (e.g. World Bank 2004, FAO 2008). Many organizations seeking to acquire land aim to hold themselves to these standards to ensure that they are respecting the adopted best practice. This paper will consider whether Uganda is ready to welcome international parties to forcibly acquire land in Uganda, or whether further reform is needed to ensure that

the local standards are sufficiently high. This will be of particular relevance as Uganda's Parliament is considering proposed amendments to parts of the Constitution to change the existing framework.

2. The Public Interest Justification

As set out in the introduction, it is not incompatible for a state to place significant importance on the protection of property rights, but nonetheless to have a legal framework which allows the state to appropriate land in certain circumstances. This measure, when used properly, can facilitate the completion of projects that are in the public interest, and which might not otherwise be able to progress. This is particularly relevant for infrastructure projects such as railway lines, where the state otherwise risks being held to ransom over land acquisition, causing significant cost and delay. The important distinction identified is whether rights holders are at risk of 'arbitrary' dispossession. In order for any state dispossession to not be arbitrary, it must meet a well-defined, established standard, and follow a fair, transparent and accountable process in meeting that standard, with opportunities for affected parties to make representations. There must also be a clear rationale for dispossessing rightful owners: the anticipated benefits of the project in question must be so significant that they merit overriding the rights of the affected individuals and communities.

2.1 Justification for Appropriation: The Legislative Principles

Article 26 to the Ugandan constitution (1995) states:

> ***"26. Protection from deprivation of property.***
>
> *(1) Every person has a right to own property either individually or in association with others.*
>
> *(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—*
>
> > *(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and*
> >
> > *(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—*
> >
> > > *(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property;*

and

(ii) a right of access to a court of law by any person who has an interest or right over the property." (Republic of Uganda, 1995)

There is a similarity in these principles to those set out in the European Court of Human Rights Protocol:

"1. Protection of property

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

*(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." (*European Convention on Human Rights, as amended)

This is of interest as a comparison given the context to the foundations of the ECHR in establishing protections against totalitarian tendencies. Both documents seek to set out important founding principles on the limitation of the power of the state; in Uganda's case, the Constitution is introduced by "recalling our history which has been characterized by political and constitutional instability" and "recognizing our struggles against the forces of tyranny, oppression and exploitation" (Republic of Uganda, 1995).

2.2 Justification for Appropriation: The Legislative Framework

In Uganda, the Constitution sets out the hurdle that must be passed in order to bring about a justified deprivation of property. Where adhered to, this will offer some protection for rights holders against arbitrary dispossession. The key terms are set out under the first limb of clause 2 to article 26, which holds that land can only be taken where the acquisition is "necessary for public use or in the interest of defence, public safety, public order, public morality or public health". The second limb to clause 2 requires that in addition to the land being required for one of the stated purposes, that "prompt, fair and adequate" compensation must also be paid. The matter of compensation is further discussed in part 2 to this paper; this section focuses on the *circumstances* in which forced dispossession can be justified.

The first part to Article 237 to the Constitution further provides:

"*237. Land ownership*

(1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

(2) Notwithstanding clause (1) of this article—

(a) the Government or a local government may, subject to article 26 of this Constitution, acquire land in the public interest; and the conditions governing such acquisition shall be as prescribed by Parliament;…"

The ambiguities arising from the term "public use" in Article 26 and "in the public interest" in Article 237 have been the subject of discussion (Mugumbwa, 2014). A public park is an unambiguous public use, as is a public highway, since they are available for any member of the public to use. A case could be made that a railway falls within the same category, although it is less clear-cut. Even more contested is whether land use for a profit-making entity could fall within this category. There is no supplemental legislation or guidance as to what this entails, although Section 73 to the Land Act 1998 does extend powers of compulsory acquisition to the "execution of public works").

There are 9 pieces of legislation, which set out specific circumstances in which land can be compulsorily acquired. These are as follows:

Legislation permitting permanent compulsory acquisition of land	Article or Clause	Prerequisites for acquisition
Principles for acquisition		
Land Acquisition Act (1965)	3	Acquisition is possible when the Minister makes a Statutory Declaration that the Government requires land for a public purpose.
Constitution (1995)	26	Compulsory acquisition is permissible only when the acquisition is necessary for public use, in the interest of defence, public safety, public order, public morality or public health.
	237	Land in Uganda vests in the citizens, but the Government can acquire land in the public interest, subject to article 26 of the Constitution.
Land Act (1998)	42	The Government (or Local Government) can acquire land in accordance with articles 26 and 237 of the Constitution.
Acquisition for specific purposes		
Historical Monuments (1968)	2	The Minister for Lands can acquire land that is required for the purposes of preserving or affording access to a historical object.
Uganda Posts and Telecommunications Corporation act (1992)	13	The Minister can acquire, at their discretion, any land or interest in land which is required by the corporation
Uganda Railways Corporation Act (1992)	32	The Minister can acquire, at their discretion, any land or interest in land that is required by the corporation in the exercise of its purposes.
Water Act (1997)	84	The Minister can acquire land for the purposes of the Act (which is to provide for the use, protection and management of water resources and supply.)
Electricity Act (1999)	71	If the Minister is satisfied that land is required for the purpose of providing or maintaining electricity supply services to the public, and that it is required in the public interest.
Uganda Communications Act (2000)	47	If the Minister is satisfied that land is required for the purpose of providing communications services to the public, and that it is required in the public interest.

Table 1 – Summary of legislative framework for circumstances in which compulsory acquisition is permitted (based on current laws as set out at www.ulii.org)

It should be noted that 4 of these laws were brought into force before the Constitution.

Taking Articles 26 and 237 to the Constitution together, the standard that must be met before land can be compulsorily acquired seems high. Article 237 requires and acquisition to be both in the public interest *and* in accordance with Article 26, therefore also requiring that it is also is necessary for public use, in the interest of defence, public safety, public order, public morality or public health. The 'public interest' and 'public use' terminology are used in a number of countries worldwide and are generally widely understood. However, there is room for ambiguity in each of these: any of the definitions could be interpreted generously to include a wide range of uses, and it would be helpful for there to be guidance about the requirements to be met in each of these cases. This would, for example, help to distinguish a legitimate cause for acquisition in the name of 'public use'. The other (specific purpose) legislative provisions (such as the Water Act and the Electricity Act) limit compulsory acquisition to specific requirements of infrastructure providers, and therefore face less potential ambiguity than the general terms.

It should also be noted that many of the legislative provisions set out above also explicitly permit the Government to acquire land by agreement for any of the required purposes. Acquisition by negotiation should be attempted in the first instance and the government should seek to reach agreement wherever possible, before resorting to compulsion: it is a draconian measure which should only be used as a last resort, not least to avoid undermining the protections offered by Article 26. None of the pieces of legislation set out in table 1 provide a means for aggrieved parties to be able to challenge the compulsory acquisition. This is covered further in the next section.

2.3 Statutory Process

In Uganda, compulsory acquisition of land is authorized by the Constitution for the reasons set out above in Table 1. The Land Acquisition Act 1965 sets out that:

> *"Whenever the Minister is satisfied that any land is required by the Government for a public purpose, he or she may, by statutory instrument, make a declaration to that effect."*

The Land Acquisition Act goes require that a Statutory Instrument sets out the location, approximate area of the land, and a plan of the land (if one exists). Once the Instrument has been made, notice is served on the occupiers of the land to alert them of the acquisition. An 'Assessment Officer' is appointed by the Minister, and is then responsible for marking out the land, putting up notices, and setting a date that claimants (the people with interests in the land) should appear before the Assessment Officer. That appearance is between 15-30 days after the notices are put up. Claimants have to appear before the

Assessment Officer and set out the nature of their interest, the claim that they are making for compensation, and any objections to the plan of land to be acquired. There are no provisions in the legislation for objections to the process of acquisition, challenging the public interest justification, or proposing alternatives. Instead, the objection process is limited to inaccuracies regarding ownership, or to appeal the amount of compensation awarded.

The process set out in the Land Acquisition Act places a significant amount of power at the hands of the executive arm of government with no significant checks and balances, and putting significant power at the hands of Ministers. It is particularly notable that at the point of making a Statutory Instrument, which is the only opportunity for any potential scrutiny of the acquisition, a plan of the land is not required, and only an 'approximate area' has to be specified. Understanding the extent of land required is a crucial step in being able to determine whether an acquisition can be justified in the public interest. In order to put together a case to assess whether a dispossession in the public interest is justified, the impact on existing rights holders must be considered. This cannot be done when making reference to an approximate area of land, nor can it be shown that the land to be taken is the absolute minimum required in order to achieve the objectives for which the acquisition is being made. In the absence of knowing who will be dispossessed, and the rights they will be dispossessed of, it is impossible to weigh the balance of the lost rights against the benefits of the purpose for which the land is being acquired. Whether or not there is a sufficient justification in the public interest can only be decided relative to an understanding of the detrimental impacts.

It is recognized that in the absence of an adequate land information system, especially in relation to customary tenure, this poses some difficulty. At the time of the Land Act 1965, customary land rights were not recognized. The Act should therefore be amended to reflect the means by which customary rights are determined during the assessment process, to ensure that customary rights holders are properly involved in this process. The lack of adequate records of customarily owned land is a problem in itself, as noted by the National Land Policy (2013). However, the lack of easily assembled information does not lower the standards to which the state should hold itself. In circumstances where land is proposed to be compulsorily acquired and there are insufficient records, additional efforts must be made to make enquiries of relevant local bodies, and involve community leaders. It would be better still, to take these steps proactively, before there is any proposed acquisition, in order that the extent of rights are well known and understood.

Under the legislative provisions set out in Table 1, there is a significant amount of power in the hands of the Minister, with very limited recourse for affected parties (Alden-Wiley, 2006). The lack of opportunity to challenge the rationale for the acquisition of land (including the merits of the case in the public interest) or to undertake scrutiny of the need for the land means that the state is very powerful; the fair and just execution of the legislation relies on the transparency, accountability and professionalism of politicians. There is less immediate reason for concern when acquisition powers are limited to land required for electricity works, or communications, since these are well defined and well understood. However, where there is a broader definition such as 'public interest', or even the conflation of 'public interest' and 'public use', then there ought to be an onus upon the state to make the case in favor of the public interest or public use benefits, rather than taking it as a given. There should be opportunities for affected parties to make a case against a proposed acquisition, without needing to resort to a challenge in the court. 'Public interest' is not the same as 'of convenience to the state', and such projects will inevitably lead to disagreements. The public airing of concerns is much more likely to lead to transparent and respected decisions, than decisions imposed from above.

The National Land Policy ("NLP") was published in February 2013. It is described as a "framework for reforms" and as such sets out a strategy for future legislation, rather than itself having any legislative effect. The NLP acknowledged that "the central government, has not, in the past, exercised this power [of compulsory acquisition] responsibly and in the public interest". A policy statement is made to declare that the state shall "exercise the power of compulsory acquisition responsibly and in the public interest". In order to ratify this policy statement, the Land Act and the Land Acquisition Act are to be amended to include a "set of regulations and guidelines outlining the roles and responsibilities of central government, local government, and different state organs and agencies in the exercise of this power, and prescribe guidelines and procedures for the payment of prompt, adequate and fair compensation by local governments." Despite commitments made in the NLP 'Implementation Action Plan' for the period 2015/16 – 2018/19, these amendments have not yet been put in place.

Many countries use 'public interest' or 'public use' criteria to assess when compulsory acquisition is justified. There have been a number of recent instances where these criteria have been subject to particular scrutiny. In the United Kingdom, a recent compulsory purchase order[1] (which sought to acquire existing residential properties in order to redevelop a site), objections made to the compulsory purchase order led the holding of a public inquiry, which permits objecting parties to present their case.

[1] The London Borough of Southwark (Aylesbury Estate Site 1B – 1C) Compulsory Purchase Order 2014

Having heard the evidence, the inspector (who presides over the Inquiry) reported that compulsory purchase powers should not be granted, because there was not a sufficiently compelling case that the purposes for which the acquisition was sought justified the interference with rights of the affected parties. The Secretary of State agreed with the Inspector's recommendation not to confirm the use of powers. The matter has subsequently been subject to further review, but demonstrates the burden on the state (in this case through local government) that is required in the United Kingdom context. Similarly, there are recent cases in both the United States (the well-known *Kelo*[2] case) and in Australia (*Hammercall Pty Ltd v Minister for Transport and Main Road and Others (2015)*) in which there has been detailed consideration of whether the principles required by law in the respective states has been met. Although in both of these instances the courts found that the proposed acquisitions were lawful, each provides an example in which there was an opportunity to scrutinize whether the acquisition met the standard set out in law.

2.4 Adherence to Statutory Process

One of the preconditions to compulsory acquisition set out in the Constitution is that compensation is paid in advance of taking possession. As originally drafted, the Land Acquisition Act (1965) permits possession in advance of compensation if the Minister considers it to be in the public interest. There have been two recent cases in which the courts have upheld the Constitution above the Land Acquisition Act, and required that compensation is paid in advance of possession:

> *Uganda National Roads Authority vs. Irumba Asumani & Another, Constitutional Appeal No. 02 of 2014*
>
> *Advocates for National Resources Governance and Development & 2 Others vs. Attorney General & Another, Const. Petition No.40 of 2013.*

The requirement to pay compensation in advance of possession is a progressive one, as it ensures that rights holders are not dispossessed without certainty about what they are entitled to. This allows relocation arrangements to be made with minimal hardship, and ensures that the transaction takes place in as orderly a manner as possible, despite the nature of the acquisition being compulsory.

[2] Susette *Kelo et al v City of New London, Conneticut et al*

2.5 Proposed Changes to Article 26

Following the judgments of the cases detailed above, the Ugandan Government has sought to make amendments to Article 26 to the Constitution to permit acquisition to take place in advance of compensation being paid. The proposed amendments were described in a Ministerial Statement (Ministry of Housing, Lands and Urban Development, 2017), which sought to justify the change on the basis of a number of cases, including where disagreement over compensation has caused significant delays (and therefore increased cost) to projects. Nine projects are listed, each with cases identified in which delays arisen where rights holders have disputed or challenged the compensation offered to them, or have objected to the proposed acquisition. As the Statement goes on to explain, in the circumstances a compensation award is challenged, the acquisition cannot go ahead until it is agreed. In one example presented in the Ministerial Statement, the conditionality of World Bank loan funding (in respect of upgrades to the Hoima-Kaiso-Tonya Road) is presented as a justification for nonetheless taking possession of land pending resolution on compensation. This is clearly unconstitutional, and the conditions of an international funding body should not be given precedence over the Constitution of the recipient country.

The proposed amendments have faced significant criticism from LEMU and other NGO's. Their concerns are well documented, and will not be repeated here. However, it is worth reflecting further on alternative ways that progress can be made with infrastructure projects, without a heavy-handed change to the Constitution. The particular concern is of challenge to compensation amounts awarded by the Chief Valuer not being accepted by rights holders, with the implication that these affected rights holders are being unreasonable. The matter of compensation itself is covered in the latter part of this paper, however, the existence of numerous cases of compensation appearing too low could equally be construed to suggest that the Government valuer has consistently undervalued the compensation that is due. There are a number of simple measures that could be taken in order that disputed compensation sums do not cause undue delay. The simplest would not require change to the law. In respect of the legislative framework for land to be acquired compulsorily, it is worth nothing that the Land Act 1998 makes provision as follows:

> ***"76. Jurisdiction of district land tribunals.***
>
> *(1) The jurisdiction of a district land tribunal shall be to—*
>
> *...determine any dispute relating to the amount of compensation to be paid for land acquired under section 42*
>
> *...determine any other dispute relating to land under this Act. "* (Republic of Uganda, 1998)

The Land Act made provision for the creation of a Land Tribunal in every district in Uganda to hear land cases. In practice, insufficient funding led to few of these Tribunals being created, and a long backlog of cases to be heard developed (Hunt, 2004). Research by Joireman (2007) showed that in Kampala, the Tribunal only sat for two days per month, regardless of the number of cases filed. The unsuccessful implementation of Land Tribunals has meant that their functions are now predominantly heard in Magistrates' Courts. Although not currently well functioning, this does suggest the potential to find fairer means to acquire land promptly without taking possession in advance of compensation. The establishment of sufficient Land Tribunals to hear and judge dispute cases would allow cases to be heard quickly and fairly, by an authority with a good understanding of land matters. An allowance for time for this process to happen should also be drafted into project plans and funding requests. The inconveniences created for projects should not be used to justify unfair practices – taking land compulsorily is a serious step to take and the process must be done properly even when not convenient.

The two cases in which the courts intervened to uphold the constitution show that the Government has been content to operate outside the Constitution when it is convenient to do so. There may be other cases that did not reach the courts. Given this context, the proposed amendments to the Constitution show a concerning further attempt to legitimize an approach that places even greater power at the hands of the state.

The lack of established Land Tribunals is part of a wider governance problem whereby law is entrenched, but not followed (or where it is followed only to a limited extent) (Alden-Wily, 2006). Trust in government will not be established when what is written on legislative paper is different to what is implemented in practice. Uganda does not fare well in the World Justice Projects 2017-18 rankings, at 104 of 113 countries, and showing a 'weaker adherence to the rule of law' in all categories. It is damaging for the state to make legislative provisions and then not adhere to them, and alternate measures should be implemented which allow the Constitutional principles to be upheld.

The matter of compensation is returned to in section 2.

2.6 Recommendations

Although there are a number of shortcomings in the existing systems, it does not mean that it is impossible for there to be fair appropriation of land for public interest projects in Uganda, merely that there is a significant amount of work to be done in order to ensure there are sufficient protections in place to justify use of the term 'fair'.

Key elements to this in relation to making the 'public interest' include: a rigorous framework upon which public interest cases are made and assessed, not declared; opportunities for involvement of communities and affected parties early in the process to consider alternatives, and to allow effective participation; and for a greater understanding of what constitutes public good, in order to balance development outcomes with human rights. In line with the introductory principles to the Constitution, development should be inclusive, not something that is done to people: "The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance" (Republic of Uganda, 1995).

In order to help to resolve the matters that have led the Government to propose changing the Constitution, there are a number of straightforward measures that can be put in place in order to ensure there are fair practices in line with the Constitution and other legislative measures as they currently stand. The costs of compensation, and the time required for settling compensation should be factored into a project budget and plan, in order that the demands of the project do not become the driver for unconstitutional behaviours. In addition, the reestablishment of well-functioning Lands Tribunals would provide the opportunity to satisfy disputes, and provide opportunities for citizens to present their case. If these means can be provided, then the concerns of the Minister outlined should be answered in a way that preserves Article 26.

Whilst this sounds onerous, it is right that there is a high bar for compulsory acquisition, since the stakes are high. Dispossessing people of their land is not only a matter of land control, but also impacts perceptions of security of tenure and trust in the system. Where LEMU works with rural communities, its first task is to gain the trust of the community. Often, there is a fear that the arrival of people seeking to talk about land suggests that land is going to be stolen. Illegal land grabbing is a reality faced in many rural communities - the State must ensure that it doesn't engage in the same practice.

3. Compensation for Loss of Land Rights

The second dimension of 'fairness' in compulsory acquisition relates to what the deprived landowner is entitled to as a result of being forcibly dispossessed of their land. The principle underlying UK law (and in a number of other systems across the world) is of 'equivalence', meaning that the compensation sum should put the dispossessed landowner in the same position following acquisition as far as money can. Before establishing rules regarding compensation, it should be decided what is to be achieved, and in particular whether it is sought to place people in the same position financially as they were before their land was acquired, or whether it is about preserving and restoring livelihoods. There is no defined 'purpose' for compensation in Ugandan law, leaving it open to interpretation.

There are a 2 pieces of Ugandan legislation, which include compensation matters. These are as follows:

Legislation which includes compensation provisions	Article or Clause	Summary of compensation matters
Constitution (1995)	26	Compulsory deprivation of property is permissible only when …made under a law which also makes provision for prompt payment of fair compensation prior to possession being taken
	243	Land Tribunals will be responsible for determining compensation for land acquired in the instance of a dispute
Land Act (1998)	76	District Land Tribunals will determine disputes relating to compensation payable for land acquired compulsorily
	77	Sets out the basis for compensation for land acquired, comprising open market value or depreciated replacement cost, the value of standing crops and a disturbance allowance

Table 2 – Summary of legislative framework for compensation payable following compulsory acquisition (based on current laws as set out at www.ulii.org)

3.1 Basis of value and entitlement to compensation

Prior to recognition of customary tenure as one of four statutorily recognized tenures in the Constitution, customary occupation was considered to be effectively a tenancy at will, with the Government able to evict customary occupants at three months notice, with compensation payment limited to the value of improvements to the land (i.e. customary 'occupants' were not considered to be the beneficiaries of any value inherent within the land itself). Once customary tenure was recognized in law, the means for establishing compensation had to change in order to recognize the equal stature of customary rights

holders in respect of compensation, and in doing so, the principles applied to individualized land have been applied to customary tenure.

The Land Act 1998 sets out that compensation for land acquired by compulsion is to be determined by the Lands Tribunal as follows:

> *"in the case of a customary owner, the value of land shall be the open market value of the unimproved land;*
>
> *the value of the buildings on the land, which shall be taken at open market value for urban areas and depreciated replacement cost for the rural areas;*
>
> *the value of standing crops on the land, excluding annual crops which could be harvested during the period of notice given to the tenant.*
>
> *In addition to compensation assessed under this section, there shall be paid as a disturbance allowance 15 percent or, if less than six months' notice to give up vacant possession is given, 30 percent of any sum assessed under subsection (1).*
>
> *The rates set out in the list of rates of compensation referred to in section 59(1)(e) shall be used in determining the amount of compensation payable."*

The drafting of the legislation is broadly comparable to examples in a number of countries. The concept of market value is widely used to replicate the financial terms that would be agreed if land were being willingly bought and sold. This is intended to provide 'equivalence', since the compensated person is then paid the amount that they would have received if they had chosen to sell. This can be a difficult concept to grapple with when it comes do an involuntary sale, particularly if it impacts a person (or group) that does not consider their land in monetary terms. This difficulty applies in particular to customary rights holders, who often see themselves as stewards of land for the next generations, rather than as owners of an asset. This begs the question of whether open market value is an appropriate measure of compensation, which is recognized by the World Bank (World Bank, 2004).

The majority of customarily held land rights are as family or community land, and are usually undocumented. Determining the market value of complex bundles of rights becomes more complex when considering multiple rights to a piece of land. For example, if the totality of a community's land had a market value of $50,000USD as a single land interest and there were 100 members of that community, would it be appropriate to say that each community member should receive $500USD? It is not clear that this would achieve equivalence. Prior to the acquisition, each party had access to the full extent of the land. This simplified example shows how the notion of market value needs much greater consideration

than can be set out in law. It would be appropriate to have a set of clear guidelines and principles making clear what is to be achieved, particularly with respect to family and community land. It is noteworthy that the legislation refers to "a customary *owner*" (emphasis added, which implies individualized rights, and does not provide any further detail with respect to family or community land. Whilst land will have a market value, to be assessed by a competent valuer, the value of that land as a single interest will not capture the value of what is being taken away from a group of people with rights to that land. Furthermore, many customary rights holders do not conceive of their land as a financial asset, but as a source of livelihood. A monetary sum based on land value cannot compensate for lost community connections, nor the lost land of future generations. In addition, where there is additional value inherent in land that is being acquired due to its natural resources, it could be argued that a portion of that value should be shared with the relevant community to reflect their long-term stewardship – this is not currently accounted for in law or policy.

Most customary land rights are undocumented and it is recognized by FAO (2008) that it may be difficult to determine the correct beneficiaries for compensation. The process set out by the Land Acquisition Act requires rights holders to make themselves known to the Assessment Officer following notices being posted on the affected land. As already set out, the onus should be on the state to identify the rights that exist in an area that might be subject to compulsory acquisition. The proper implementation of a customary land registry (as provided for in the NLP) would assist in this regard. Where such a registry does not yet exist, enquiries should be made of local authorities (including community leaders) well in advance of determining whether the compulsory acquisition process should be entered into. This would provide opportunities to involve communities, and where possible, to mitigate the impacts of the proposed acquisition. It would also provide the opportunity to determine how best to compensate the affected community, whether that is through relocation and resettlement, or financial compensation.

Many of the people that are affected by proposed compulsory acquisition will not be familiar with the process, the monetary value of their land (as defined in the legislation) nor their rights as protected by the Constitution. In order to ensure fair outcomes, affected parties should be entitled to advice and advocacy, both in respect of any objections to acquisition and in compensation. International standards recognize the importance of including impartial experts in the process to determine compensation (FAO, 2008). This could either be through the appointment of an expert to each side, who seek to reach an agreement that is acceptable to both parties, or in a decision-making capacity.

3.2 Recommendations

Land valuation is a complex subject, particularly when considering intricate networks of rights, such as on community land. The Government's valuer has expertise in the field, but should be willing to be subject to critique by a representative of the affected parties in order to negotiate an agreed outcome. Parties being dispossessed should be entitled to representation by an independent expert. If government appoints the only valuer, then it both gives that individual too much discretion, and increases the risk of undue influence. In order to properly comply with the terms of the constitution, both sides should be represented, at the cost of the state. This will provide greater reassurance to people being dispossessed that they are getting a fair amount of compensation. This should also help to resolve some of the concerns identified by the Ministerial Statement, by ensuring that affected parties have realistic expectations about the compensation they may be entitled to.

4. Return of Land

When reviewing the legislative framework, it is not clear who will ultimately hold land that is acquired by compulsion, and there do not appear to be any arrangements for the return of land following its required use. In any event, it is unlikely that customary land will ever be returned to customary tenure - if it is acquired it will almost certainly become freehold land in perpetuity. It is recognized in the NLP that Growth in Foreign Direct Investment (FDI) can lead to alienation of land from smallholder farmers and result in tenure insecurity, food insecurity, land conflict and poverty, and dispossessing people for national projects can have the same impact. Careful attention should be paid to the proposed arrangements for any given acquisition, in order that land can potentially be returned in the future when appropriate. There is the potential for innovative arrangements of collective leasing to be put in place to retain the interest in the community or family land once it is no longer required for the purposes for which it was compulsorily acquired. A temporary relocation for the period for which the land is required, with a return to the community land could (in appropriate circumstances) provide a much better means of compensation than an assessment of market value.

5. International Policy

International policy or guidelines (e.g. World Bank, 2013) are necessarily made at a generalized level. However, the existence of principles-based guidance does not remove the need for country-specific standards setting out the pre-requisites to compulsory acquisition, and the associated protections offered. National guidelines should follow internationally accepted standards, and yet properly reflect the

circumstances and context of the country in question, in order that citizens can properly understand the process and make them relevant to their own circumstances.

6. Conclusions

The prospect of the Ugandan government speeding up land acquisition by being able to take possession before paying compensation (as is under consideration by Parliament) has been supported by international funding bodies, frustrated at lack of progress in public interest projects. Whilst enthusiasm to harness inward investment should be welcomed, a cautious note must be expressed. Dispossessing Ugandan rights holders of their land in favor of overseas funders (potentially including private sector investors with a profit motivation) is only justifiable if there is a clear and compelling economic case, and if the benefits significantly outweigh the costs, justifying the impact to the landowner in the greater public interest. The hurdle should be set appropriately high, and the process should not be rushed to seize on quick investment at the risk of bringing about unfair outcomes.

There is no such thing as an absolute, indefeasible right to land anywhere in the world; however, a clear distinction can be made between the certainty that a landowner might have about the sanctity of their rights (if they will be treated fairly in the circumstances of having land appropriated) and citizens who feel powerless against a state that might subject them to a random compulsory acquisition of land. Democratic governance is of huge significance to people's notions of security, and whether their rights will be protected by the state, or whether they should fear the state's power to dispossess rights holders.

The interaction between international funding for public interest projects and national laws should not lead to national laws being overridden, and solutions need to be found to stop this from happening. States should not be able to hide behind a legitimacy conferred by well-drafted state practices, but actually choose not to respect constitutional requirements when convenient to do so. Laws alone cannot deliver fair means of compulsory acquisition for public interest projects – they must be upheld by strong institutions willing to provide accountability and to hold themselves to high standards. It is important to get the laws right, since they are necessary, but it is then crucial to ensure that public officials act in both the letter and the spirit of the laws, to ensure that the rights of the most vulnerable are protected in accordance with the principles of the Constitution. The public interest will only be served when there are sufficient checks and balances on executive power to ensure robust governance.

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